

Child Custody and Return of Child Back to the Country to Which He / She Belongs



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Introduction:

Due to increasing international business and professional opportunities young people get married to persons living in different countries. Children are also born in those countries and hence in the same family there are citizens of different countries. Then when matrimonial disputes arise between the parties conflict of laws arise, because of different reasons. In some cases one parent take away the child from the matrimonial home to a different jurisdiction. Cases are filed by the parties in different jurisdictions according to different laws of residence. In such matters the following questions arise for the determination of the Court. The author is answering those questions in the light of various judgments of the Supreme Court of India.

Determination of ordinary residence of Minor:

This question is very important because only on the basis of the ordinary residence of the minor the jurisdiction of the Court is decided for the purpose of guardianship of the minor. Section.9 of the Guardians and Wards Act, 1890 makes a specific provision as regards the jurisdiction of the Court to entertain a claim for grant of custody of a Minor. For the convenience of the readers S.9 of Guardians and Wards Act, 1890 is reproduced below.

“9. Court having Jurisdiction to entertain application – (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having Jurisdiction in the place where the minor ordinarily resides”

So it can be understood from the bare reading of the above said Section.9 of the Act, that the solitary test for the purpose of the determination of the Jurisdiction of the Court is the “ordinary residence of the minor. This issue even though may also have an element of question of law, it is mainly a question of fact because first the facts have to be ascertained before determination of the question.

In a very old pre-independence case Annie Besant Vs G. Narayaniah AIR 1914 PC41 the same issue of determination of “ordinary residence of children” who were living in Chengulpet, Tamil Nadu,

who were given custody to Mrs. Annie Besant, for the purpose of educating them in England. In that case Privy Council held that where ever children were residing at the time of the application should be considered as ordinary residence of the children.

In *Kuldip Nayar Vs union of India* (2006) 7SCC1 Supreme Court of India interpreted “ordinary residence” as used in Representation of People’s Act, 1950. It held that the word ordinarily is primarily directed not to duration but to purpose. In this sense the question is not so much where the person is found ordinarily, in the sense of usually or habitually and with some general merely for some special or limited purpose.

Principle of Comity of Courts:

The Principle of “Comity of courts” ensures that Foreign Judgments and decrees are unconditionally conclusive of the matter in controversy. In *Rachi Machoo Vs Sanjeev Machoo* (2011) 6 SCC 479 the Supreme Court of India held that Interest and welfare of the minor being paramount, a competent court in this country is entitled and indeed duty bound to examine the matter independently, taking if there is any foreign judgment, if any, only as an input for its final adjudication. It also held that simply because a foreign court has taken a view on any aspect concerning the welfare of the minor is not enough for the courts in this country to shut out an independent consideration of the matter. Objectivity and not abject surrender is not the mantra in such cases. Since no system of private international law exists that can claim universal recognition on this issue, Indian courts have to decide the issue regarding validity of the decree in accordance with Indian law. Comity of Courts simply demands consideration of any such order passed by Foreign Courts and not necessarily their enforcement.

Fling of Habeas Corpus Petitions in Child Custody matters:

The Writ Court can exercise its jurisdiction in child custody matters, if the child is within the jurisdiction of the Court. Proceedings in the nature are summary in nature, where the legality of the detention of the alleged detenu is examined on the basis of affidavits placed by parties. Even so, nothing prevents the High Court from embarking upon a detailed enquiry in cases where the welfare of minor is in question, which is paramount consideration for the court while exercising its parens patriae jurisdiction. But cases arising out of proceedings under Guardians and wards Act,

the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises its jurisdiction.

Repatriation of Children:

In the matter of Dhanwanti Joshi Vs Madhav Uncle (1998)1SCC112 The Supreme Court of India held that nothing precludes the Indian Courts from considering the question on merits.

In the matter of Elizabeth Dinshaw V Arvand M Dinshaw (1987)1 SCC 42 while dealing with a child removed by the father from USA contrary to the custody orders of the USA court directed the child be sent back to USA to the mother not only because of comity but also because, on facts- which were independently considered – it was in the interests of the child to be sent back to the native state.

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